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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

STACIA STINER; RALPH CARLSON, in his
 capacity as Trustee of the Beverly E. Carlson and
 Helen V. Carlson Joint Trust; LORESIA
 VALLETTE, in her capacity as representative of
 the Lawrence Quinlan Trust; MICHELE LYTLE,
 in her capacity as Trustee of the Boris Family
 Revocable Trust; RALPH SCHMIDT, by and
 through his Guardian Ad Litem, HEATHER
 FISHER; PATRICIA LINDSTROM, as
 successor-in-interest to the Estate of ARTHUR
 LINDSTROM; BERNIE JESTRABEK-HART;
 and JEANETTE ALGARME; on their own
 behalves and on behalf of others similarly
 situated,

Plaintiffs,

v.

BROOKDALE SENIOR LIVING, INC.;
 BROOKDALE SENIOR LIVING
 COMMUNITIES, INC.; and DOES 1 through
 100,

Defendants.

Case No. 4:17-cv-03962-HSG (LB)

[REDACTED]
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
EXCLUDE THE
DECLARATION AND
TESTIMONY OF DR. CRISTINA
FLORES

Date: June 16, 2022
 Time: 2:00 p.m.
 Crtrm.: 2, 4th Floor

Judge: Haywood S. Gilliam, Jr.

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1 **I. INTRODUCTION**

2 Brookdale has a legal obligation to ensure that its facilities are staffed at levels sufficient to
3 meet the assessed needs of its residents. Brookdale purports to meet its obligations by using a

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 Plaintiffs' expert, Dr. Cristina Flores, has analyzed and identified multiple defects in
9 Brookdale's benchmark-hours methodology. These defects place residents at a substantial and
10 unreasonable risk of not receiving required care services. By the express terms of Brookdale's staffing
11 formula, the [REDACTED] are far too low and are not
12 realistically calculated to provide caregivers with enough time to perform particular care tasks. *See*
13 Dkt. 278-4 (Declaration of Cristina Flores, PhD in Support of Plaintiffs' Motion for Class Certification
14 ("Flores Decl.")), ¶¶ 71-72. Because the [REDACTED] are too low, the ultimate labor
15 benchmarks also are too low, and are insufficient to ensure that Brookdale has enough caregiver
16 staffing to provide its residents with all the services they have been promised in their Personal Service
17 Plans. *Id.*, ¶¶ 59-63, 72. Of necessity, therefore, Brookdale's use of task times that are too low results
18 in benchmark hours that also are too low. What is more, Brookdale consistently fails to meet even its
19 benchmark hours. Based on an analysis of the Labor Detail Report data produced by Brookdale for all
20 54 facilities that Brookdale operated or managed in California between January 1, 2017 to December
21 31, 2020, Brookdale's staffing was [REDACTED] of the total days within
22 this period. *See id.*, ¶ 71(d).¹

23 Brookdale's attack on Dr. Flores' opinions and conclusions concerning Brookdale's staffing
24 formula should be rejected. Dr. Flores' opinions are based on an application of the same methodology

25
26 ¹ The original analysis of actual staffing versus benchmark staffing described in Dr. Flores' August 15,
27 2021 Declaration, was limited to the 54 Brookdale facilities that it operated during the entirety of the
28 class period. Subsequent to Dr. Flores' Declaration and deposition, Brookdale produced additional
labor detail report data on December 31, 2021 (BKD2942805-7). An updated analysis of the new data
for 88 facilities shows that Brookdale was below [REDACTED] of days.

1 that was recently found to rest on a reliable foundation and to be relevant to the class certification
 2 inquiry in the matter of *Heredia v. Sunrise Senior Living, LLC*, No. 8:18-cv-01974-JLS-JDEx, 2021
 3 WL 6104188, at *5 (C.D. Cal. Nov. 16, 2021) (“... none of Sunrise’s arguments show that [Dr.
 4 Flores’] opinions lack a ‘reliable foundation’ or ‘relevan[ce] to the task at hand’ for purposes of class
 5 certification.”).

6 Further, the method Dr. Flores employed is a commonly accepted means of ensuring that a
 7 facility is staffed to meet the assessed needs of its residents. An examination of required versus
 8 available staff based on assessed resident needs “is a very common way to look at any kind of staffing
 9 ... It’s been used for many, many years in nursing homes and other businesses. They have to have
 10 some kind of simple way to know how much labor they need if they’re providing a service.”
 11 Declaration of Brian S. Umpierre in Support of Plaintiffs’ Opposition to Motion to Exclude
 12 (“Umpierre Decl.”), Ex. A (Flores Depo. at 32:14-16, 34:8-11.)² Indeed, Dr. Flores’ methodology
 13 essentially mirrors the approach used in Brookdale’s staffing procedures. *See, e.g., id.* at 38:16-18
 14 (“Brookdale does theirs by doing an assessment and coming up with numbers. They use the simple
 15 math analysis.”). Brookdale has, therefore, no valid basis to exclude her testimony. *Wendell v.*
 16 *GlaxoSmithKline LLC*, 858 F.3d 1227, 1237-38 (9th Cir. 2017) (if an expert’s “methodology is valid,”
 17 attacks on data quality, method application or persuasiveness of opinions are “matters for cross-
 18 examination”).

19 Brookdale contends that Dr. Flores’ opinions and testimony should be excluded because she
 20 relied on unsupported assumptions, misinterpreted Brookdale’s data, ignored facts, and cherry-picked
 21 data that would support her conclusions. But Brookdale’s real disagreement lies with her inputs and
 22 conclusions, which are matters for cross examination, not exclusion. *Alaska Rent-A-Car v. Avis Budget*
 23 *Grp., Inc.*, 78 F.3d 960, 968-70 (9th Cir. 2013). Dr. Flores’ methodology is well-supported factually in
 24 the record and her interpretation of disputed facts are tethered to her industry experience and the
 25 evidence produced in this case. As such, Dr. Flores is not required to accept Brookdale’s version of the

26 _____
 27 ² *See also* Umpierre Decl. Ex. A (Flores Depo. at 35:2-7 (“[I]n the long-term care setting, there are
 28 many, many articles – and they’re all listed in Exhibit 21 to 56 – that use staffing levels to compare the
 amount of time required to that available time to know if you have enough staff to meet the needs of
 the residents.”)).

1 facts. *See, e.g.*, Fed. R. Evid. 702 Advisory Committee Notes to 2000 Amendments (“When facts are
 2 in dispute, experts sometimes reach different conclusion based on competing versions of the facts. The
 3 emphasis in the amendment on ‘sufficient facts or data’ is not intended to authorize a trial court to
 4 exclude an expert’s testimony on the ground that the court believes one version of the facts and not the
 5 other.”). And Brookdale’s related argument that Dr. Flores worked backwards to achieve her desired
 6 result is meritless. Dr. Flores reviewed Brookdale’s staffing methodology, the time standards used by
 7 Brookdale in its staffing methodology, the care needs documented in the resident assessments, the
 8 amount of time required to deliver the assessed care services, and the number of staff available at
 9 Brookdale to provide such care services to residents. Flores Decl., ¶ 4. Only after analyzing all this
 10 information did Dr. Flores conclude that use of Brookdale’s staffing methodology would result in a
 11 staffing shortfall – *i.e.*, that it was mathematically and realistically impossible for Brookdale staff to
 12 produce the care services required by the residents based on their assessments and the amount of
 13 staffing hours allotted by Brookdale to provide those services. The reliability of that conclusion is
 14 further supported by the Discrete Event Simulation (DES) testing analysis performed by Mr. Schroyer,
 15 (*see* Dkt. 278-5³), as well as by the substantial number of deficiencies issued to Brookdale’s California
 16 facilities during the class period that are indicative of insufficient numbers of staff, poor resident care,
 17 and other problems consistent with facility understaffing.

18 For the reasons stated herein, Plaintiffs respectfully request that Brookdale’s motion should be
 19 denied in its entirety.

20 **II. BACKGROUND**

21 **A. Brookdale’s Staffing Methodology**

22 Under Brookdale’s Service Alignment system, [REDACTED]

23 [REDACTED]. The targets, known as [REDACTED]

24 [REDACTED]
 25 [REDACTED] Dkt. 276-7 (Wallace Class Cert. Decl.), Ex. 24 at
 26 BKD1918714. [REDACTED]

27 _____
 28 ³ Declaration of Dale Schroyer in Support of Plaintiffs’ Motion for Class Certification (“Schroyer
 Decl.”).

1 [REDACTED]. *Id.*, Ex. 25 at
 2 BKD2517637; Ex. 23 at BKD 1840459; Ex. 26 at BKD2507643; Ex. 27 at BKD1890853; Ex. 28 at
 3 BKD28846861 *id.* at ¶ 41, Ex. 51 (Bowman Depo.) at 149:1-6 [REDACTED]

4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]). Essentially, [REDACTED]

7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED] Flores Decl., ¶ 68.

11 Central to Brookdale's staffing methodology is [REDACTED]
 12 [REDACTED] Wallace Class Cert. Decl.,
 13 Ex. 23 at BKD 1840459; Ex. 26 at BKD2507643; Ex. 51 (Bowman Depo.) at 154:14-22 [REDACTED]

14 [REDACTED]
 15 [REDACTED]"). The [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]

20 [REDACTED] s. *See, e.g.*,
 21 Flores Decl., ¶ 69 (referencing BKD1906860 concerning [REDACTED]
 22 [REDACTED]). Brookdale's assisted living facilities in California are required to staff in compliance
 23 with the Labor Benchmarks. *See, e.g.*, Wallace Class Cert. Decl., ¶¶ 44-55, Exs. 31-42 (emails of
 24 senior corporate officials including three Presidents for the West Division [REDACTED]
 25 [REDACTED]).

26 The Labor Detail Report data produced by Brookdale confirms that Brookdale used the
 27 [REDACTED] at all the company's California facilities. The Labor Detail
 28 Report data identifies daily actual hours of staff time versus daily "benchmark" staff time for each

1 Brookdale facility. *See* Flores Decl., ¶ 25(f).

2 **B. Dr. Flores’ Expert Opinions**

3 Cristina Flores is a registered nurse licensed in the State of California for over 32 years, with a
4 masters’ degree in gerontology and a Ph.D. in nursing health policy. She has worked in multiple
5 assisted living facilities in California. She has been certified as an RCFE administrator in California
6 where she owned and/or operated three 6-bed facilities for over 23 years.⁴ She also served as Chief
7 Program Officer and Chief Operating Officer for a large ALF chain in California. Flores Decl. ¶¶ 7-16.
8 Based on her extensive experience and other evidence, Dr. Flores provides two separate opinions in
9 support of Plaintiffs’ motion for class certification.

10 Dr. Flores opines that Brookdale’s benchmark-hours staffing formula is defective because the
11 “norms” it uses to calculate labor benchmarks are far too low and are not realistically calculated to
12 provide caregivers with enough time to perform particular care tasks. Flores Decl., ¶¶ 71-72. Because
13 the “norms” used by the formula are too low, the ultimate labor benchmarks also are too low and are
14 insufficient to ensure that Brookdale has enough caregiver staffing to provide residents with all the
15 services for which they have been assessed and are paying. *Id.*, ¶¶ 59-63, 72.

16 In addition to her analysis of the defects in Brookdale’s staffing formula, Dr. Flores describes
17 in her second opinion a method to analyze the extent to which actual daily staffing at Brookdale’s
18 California facilities fell below levels required to meet the residents’ assessed needs. Flores Decl., ¶¶
19 33-58. That method allows for the mathematical calculation, in hours, of the daily labor time required
20 to deliver assessed services, as compared to the actual labor time available through staff each day. The
21 “simple math” approach described by Dr. Flores is conservative. For example, it does not include as
22 part of its “required hours” the staff time spent on travel to and from residents, documenting resident
23 charts, attending meetings, and other administrative tasks.⁵ Rather, it provides a “quick way to initially
24 measure if staffing levels are minimally sufficient to meet the assessed care needs of residents” before
25

26 ⁴ Pursuant to California regulations, assisted living facilities are referred to as Residential Care
Facilities for the Elderly (RCFE).

27 ⁵ The alternative approach referenced by Dr. Flores and undertaken by Mr. Schroyer – Discrete Event
28 Simulation (DES) Testing and Failure Analysis – accounts for these and other factors. Flores Decl., ¶¶
19-20; Schroyer Decl., ¶¶ 50-65.

1 moving on to a “more robust, more specific [DES] analysis.” *Id.*, ¶ 21; Flores Depo. at 47:2-6.

2 Based on the simple math analysis Dr. Flores performed (for the days where the available data
3 was complete or substantially complete), she opined that each of the six facilities contained in the
4 “sample” data set was chronically understaffed and, as a consequence, Brookdale residents were placed
5 at a substantial and ongoing risk for not receiving required and promised services.

6 **1. Opinion 1: Brookdale’s Defective Staffing Policy**

7 The methodology Brookdale uses to determine staffing in its facilities is defective and places
8 residents at a substantial and unreasonable risk of not receiving required care services. Brookdale’s
9 staffing methodology is defective and fails to ensure that facility personnel are sufficient in numbers at
10 all times to provide the services necessary to meet resident needs because the RSW/norm task times
11 used by Brookdale (BKD2874663)⁶ regarding bathroom assistance and escorting/mobility assistance
12 are unreasonably low and simply not credible. Flores Decl., ¶¶ 50-52, 71. For example, based on Dr.
13 Flores’ decades of experience (and as reinforced by industry literature), residents require on average
14 significantly more time than the [REDACTED]

15 [REDACTED]
16 [REDACTED] Indeed, Brookdale’s own task time studies contradict the norm
17 task times used to calculate benchmark hours, and are more consistent with Dr. Flores’ experience and
18 industry literature. Flores Decl., ¶ 71(a-b). Because Brookdale uses task times that are too low, its
19 benchmark hours – the maximum hours Brookdale allots for staffing on a per day basis – also are too
20 low. And Brookdale consistently fails to meet even its benchmark hours. Based on analysis of the
21 Labor Detail Report data produced by Brookdale for 54 facilities from January 1, 2017 to December
22 31, 2020, Brookdale’s staffing was [REDACTED] of the total days within
23 this period. Flores Decl., ¶ 71(d).

24 **2. Opinion 2: Description of Staffing “Shortfall” Methodology by way of** 25 **Simple Math Analysis**

26 The simple math methodology mathematically calculates the labor time required each day to
27

28 ⁶ See Umpierre Decl., Ex. LL.

1 deliver all required line-item services to residents and compares this to the actual labor time available
 2 each day.⁷ Here, an examination of the available versus required staff hours per day during the 3-year
 3 timeframes for each sample facility reveals that, on average, total facility required time exceeded
 4 available staff time at the six “sample” facilities [REDACTED] Flores Decl., ¶ 60,
 5 Table 5. The average staffing deficit at the six sample facilities measured [REDACTED]y. *Id.*, ¶
 6 61, Table 6. Similarly, the average percent of required service time omitted at the six “sample”
 7 facilities on a per-day basis is [REDACTED]%. *Id.*, ¶ 62, Table 8.

8 As Dr. Flores’ simple math analysis demonstrates, the quantity of line-item services contained
 9 in Brookdale’s resident assessments and the amount of time required to deliver that care based on
 10 Brookdale’s own norm task times and task time studies reveals that it was mathematically and
 11 physically infeasible for Brookdale’s staff to deliver all the required line-item services, given the time
 12 that was available to staff according to Brookdale’s punch detail staffing data. Flores Decl., ¶ 63. The
 13 resultant staffing shortfall at the six “sample” facilities was not an isolated occurrence but showed a
 14 pattern and practice of understaffing that subjected residents to a substantial and continuing risk of not
 15 receiving required care. That conclusion is further supported by the Discrete Event Simulation (DES)
 16 testing analysis performed by Mr. Schroyer. *See* Schroyer Decl., ¶ 77 (over 1.3 million DES
 17 engineering test and failure analyses revealed a daily average staffing shortfall of 41.5% per facility
 18 over the 3-year study period).

19 Dr. Flores’ analysis of deficiencies issued by the California Department of Social Services’
 20 Community Care Licensing Division (CCLD) lends further support to the conclusions reached in her
 21 simple math analysis. In particular, the vast majority of more than 800 deficiencies issued to 71
 22 Brookdale facilities in California from 2015 and 2021 pertained to staffing issues either directly (for
 23 specifically failing to have sufficient numbers of staff)⁸ or being indicative of insufficient numbers of
 24 staff, poor resident care, and other problems that are consistent with facility understaffing.⁹ *See* Flores

25 _____
 26 ⁷ Complete or substantially complete assessment and staffing data must be available for the days
 27 analyzed. Here, Brookdale produced complete or substantially complete data for six facilities with
 28 specific time periods. Flores Decl., ¶¶ 33-34.

⁸ *See* Flores Decl., ¶ 82(a-i).

⁹ *See* Flores Decl., ¶ 83.

Decl., ¶¶ 79-81.

III. LEGAL STANDARD

The Ninth Circuit has stated that “in evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*.” *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018); *Heredia v. Sunrise Senior Living, LLC*, No. 8:18-cv-01974-JLS-JDEx, 2021 WL 6104188 (C.D. Cal. Nov. 16, 2021). While courts should evaluate the admissibility of challenged expert testimony under the *Daubert* standard at class certification, that evaluation is not “dispositive.” *Sali*, 909 F.3d at 1006. Rather, consideration of the *Daubert* factors and the “evidence’s ultimate admissibility should go to the weight that evidence is given at the class certification stage.” *Id.* This is because at class certification the focus is the “persuasiveness of the evidence presented” as it bears on the Rule 23 analysis. *Id.* (noting “greater evidentiary freedom at the class certification stage” and that courts should not “rely[] on formalistic evidentiary objections” to “exclude[] proof that tend[s] to support class certification”); *see also Heredia*, 2021 WL 6104188, at *5 (same); *In re PFA Insurance Marketing Litig.*, No. 4:18-cv-03771 YGR, 2021 WL 5994908, at *2 (N.D. Cal. Nov. 3, 2021) (“At the class certification stage, the relevant inquiry is a tailored *Daubert* analysis which scrutinizes the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence.”) (internal quotations and citation omitted.)

Under *Daubert*, trial courts assess whether the “expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Grodzitsky v. Am. Honda Motor Co., Inc.*, 957 F.3d 979, 984-85 (9th Cir. 2020). As post-*Daubert* decisions confirm, however, the general rule remains that expert testimony should be “liberally admitted.” *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014). *See also Messick v. Novartis Pharmaceuticals Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (“The Ninth Circuit has placed a great emphasis on *Daubert*’s admonition that a district court should conduct an analysis with a liberal thrust favoring admission.”) (internal quotations and citation omitted.) The “rejection of expert testimony is the exception rather than the rule.” Fed. R. Evid. 702 Advisory Committee Notes to 2000 Amendments.

1 An expert's testimony meets the low bar of relevancy if there is "a valid connection to the
2 pertinent inquiry" at trial. *In re Ford Motor Co. Litig. (Pedante)*, No. CV 17-06656 AB (FFMx), 2019
3 WL 7177735, at *2 (C.D. Cal. 2019); *Primiano v. Cook*, 598 F.3d 58, 565 (9th Cir. 2010); *Messick*,
4 747 F.3d at 1196-97 (relevance established if evidence "logically advances a material aspect of the
5 proposing party's case").

6 The reliability prong can be established through multiple ways. *City of Pomona*, 750 F.3d at
7 1044 ("The test of reliability is flexible.").¹⁰ Trial courts have "broad latitude" in determining whether
8 an expert's testimony is reliable, and also in "deciding how to determine the testimony's reliability."
9 *Ralston v. Mortgage Investors Group, Inc.*, No. 08-536-JF (PSG), 2011 WL 6002640, at *3 (N.D. Cal.
10 Nov. 30, 2011) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142 (1999)). For example,
11 where an expert's opinion is based on science, reliability can be supported by "scientifically valid
12 reasoning, methodology, testing, or peer review." *Daubert*, 509 U.S. at 592-94. Yet even then, the
13 *Daubert* factors are "meant to be helpful, not definitive." *City of Pomona*, 750 F.3d at 1044 (quoting
14 *Primiano*, 598 F.3d at 564).

15 This inquiry is focused "solely on principles and methodology, not on the conclusions that they
16 generate." *Grodzitsky*, 957 F.3d at 984-85. If the method is valid, "attacks on the quality of the data ...
17 application of the methodology to the data, and the overall persuasiveness of the expert's opinions are
18 matters for cross-examination." *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1237-38 (9th Cir.
19 2017); *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 968-70 (9th Cir. 2013) ("The
20 district court is not tasked with deciding whether the expert is right or wrong, just whether his
21 testimony has substance such that it would be helpful to a jury.").

22 Credibility challenges do not justify the exclusion of expert evidence. *Alaska Rent-A-Car*, 738
23 F.3d at 969-970; *U.S. v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). "Shaky but admissible evidence

24 _____
25 ¹⁰ For example, reliability also can be shown from "personal knowledge or experience," if the expert
26 possesses "the minimal foundation of knowledge, skill, and experience" to support the opinion.
27 *Zagruzny v. Mercedes-Benz USA*, No. CV 19-1096 MRW, 2020 WL 3968672, at *1 (C.D. Cal. Jun. 4,
28 2020); *see also Elosu v. Middlefork Ranch, Inc.*, No. 21-35309, — F.4th —, 2022 WL 534345, at *6
(9th Cir. Feb. 23, 2022) ("An expert's specialized knowledge and experience can serve as the requisite
'facts or data' upon which they render an opinion."); *Ralston*, 2011 WL 6002640, at *4 ("Court's
frequently accept experience-based expert opinion testimony on relevant aspects of industry practice
that do not offer themselves readily to scientific or statistical analysis.").

1 is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not
 2 exclusion.” *Primiano*, 598 F.3d at 564. “Disputes as to the strength of [an expert’s] credentials, faults
 3 in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight,
 4 not the admissibility, of his testimony.” *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230-1231 (9th
 5 Cir. 1998).

6 Further, “conflicting expert testimony” is insufficient to warrant exclusion of one side’s
 7 experts. *City of Pomona*, 750 F.3d at 1049 (“Where two credible experts disagree, it is the job of the
 8 fact finder, not the trial court, to determine which source is more credible and reliable.”); *Sabadi v.*
 9 *Hartford Casualty Ins. Co.*, No. SACV 13-1928-JLS (ANx), 2015 WL 12698445, at *2 (C.D. Cal. Jan.
 10 13, 2015) (contention that expert’s “two written reports [] reached inconsistent conclusions”
 11 insufficient to warrant exclusion on reliability challenge). Courts routinely apply this sound principle
 12 in the context of class certification motions. See, e.g., *Ralston*, 2011 WL 6002640, at *10; *Giuliano v.*
 13 *Sandisk Corp.*, No. C 10-02787 SBA, 2015 WL 10890654, at *11 (N.D. Cal. May 14, 2015); *In re*
 14 *Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 625 (N.D. Cal. 2015) (declining to engage
 15 in a “battle of the experts” at the class certification stage).

16 Finally, where objections are not based on *Daubert* concerns but rather on grounds of general
 17 admissibility, the Court should afford such testimony its proper weight rather than exclude it outright.
 18 See, e.g., *Sarmiento v. Sealy, Inc.*, No. 18-cv-01990-JST, 2020 WL 4458915, at *2 (N.D. Cal. May 27,
 19 2020).

20 **IV. BROOKDALE’S ATTACKS ON DR. FLORES’ ANALYSIS FAIL**

21 Brookdale’s motion attacks the accuracy and credibility of Dr. Flores’ overarching conclusion
 22 – that Brookdale’s benchmark staffing methodology is defective. But that is not a basis to exclude
 23 expert testimony under *Daubert*. See *Alaska Rent-A-Car*, 738 F.3d at 969-70. Indeed, Brookdale is
 24 asking the Court to do what the Ninth Circuit considers to be reversible error. See, e.g., *Elosu v.*
 25 *Middlefork Ranch Inc.*, No. 21-35309, — F.4th —, 2022 WL 534345, at *7 (9th Cir. 2022) (“... Rule
 26 702 does not license a court to engage in freeform factfinding, to select between competing versions of
 27 the evidence, or to determine the veracity of the expert’s conclusions at the admissibility stage”).

28 Brookdale’s *Daubert* challenge is based on the contention that Dr. Flores employed “no

1 methodology at all” because she ignored facts and formulated opinions based on subjective and
 2 unsupported assumptions. Mot. at 4-5. But Brookdale’s self-serving characterization of Dr. Flores’
 3 work is directly at odds with the court’s findings in *Heredia v. Sunrise Senior Living, LLC*, which
 4 accepted as relevant and reliable the same simple math methodology Dr. Flores put forward in its
 5 decision certifying a class of current and former residents similar to the class Plaintiffs seek to certify
 6 here. *Heredia*, 2021 WL 6104188, at *5.

7 Further, an argument that an expert relied on incorrect facts is not a proper basis to exclude
 8 testimony. *Giuliano*, 2015 WL 10890654, at *10 (arguments regarding flawed methodological
 9 assumptions go to weight, not admissibility, citing *Cotton v. City Eureka, Cal.*, No. C 08-04386 SBA,
 10 2010 WL 5154945, at *13 (N.D. Cal. 2010) (“The matter of whether the assumptions underlying
 11 [expert’s] opinions are accurate is germane to the weight, as opposed to the admissibility, of his
 12 opinions.”)). That is true even “when the parties’ experts rely on conflicting sets of facts.” *Fresenius*
 13 *Med. Care Holdings, Inc. v. Baxter Int’l, Inc.*, No. C 03-1431 SBA, 2006 WL 1390416, at *7 (N.D.
 14 Cal. May 18, 2006) (“[w]hen, as here, the parties’ experts rely on conflicting sets of facts, it is not the
 15 role of the trial court to evaluate the correctness of facts underlying one expert’s testimony”); *In re*
 16 *NJOY, Inc. Consumer Class Action Litig.*, 120 F.Supp.3d 1050, 1070-71 (C.D. Cal. 2015) (expert may
 17 testify on “his party’s version of the disputed facts”). Rather, the *Daubert* inquiry centers on the
 18 soundness of the methodology at issue, not the correctness of the conclusions reached. *Daubert v.*
 19 *Merrell Dow Pharms., Inc. (Daubert II)*, 43 F.3d 1311, 1318 (9th Cir. 1995).

20 **A. Dr. Flores’ Simple Math Analysis is Reliable and Based on A Sound Methodology**

21 Brookdale argues that Dr. Flores’ employed “no methodology at all” when forming her
 22 opinions in this case. Mot. at 4. Brookdale is wrong. The methodology underlying Dr. Flores’ simple
 23 math approach is grounded in the well-accepted and common-sense principle that staffing levels must
 24 be sufficient to meet “workload,” specifically, residents’ assessed needs multiplied by the amount of
 25 time reasonably necessary to meet those needs. Flores Decl., ¶¶ 32-33. That methodology uses the
 26 same logic and structure that Brookdale uses to set staffing at its facilities. *See, e.g.*, Umpierre Decl.,
 27 Ex. A (Flores Depo. at 38:16-18 (“Brookdale does theirs by doing an assessment and coming up with
 28 numbers. They use the simple math analysis.”)). Essentially, [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]. Flores Decl., ¶ 68. Dr. Flores evaluated
 5 whether Brookdale's benchmark staffing formula generated sufficient caregiver hours to meet the
 6 assessed needs of the residents. Flores Decl., ¶ 5.

7 Dr. Flores testimony and declaration establish that the foundation for the data inputs used in
 8 both her simple math analysis and the more robust DES analysis derive from voluminous facility-
 9 specific resident assessment data, resident move-out data, resident census data, punch detail staffing
 10 data (including job title and department designation), task times and frequencies for assessed services,
 11 and floor plans obtained directly from Brookdale. Flores Decl., ¶¶ 23-25; Umpierre Decl. Ex. A (Flores
 12 Depo. at 44:6-12, 76:6-24, 100:17-19, 106:6-107:3, 107:17-22). Thus, to evaluate whether Brookdale's
 13 benchmark-hours protocol is capable of providing sufficient hours to meet the required workload, Dr.
 14 Flores compared actual staffing data from time punch records at six Brookdale facilities to the required
 15 workload (*i.e.*, the time required to meet actual resident needs). Flores Decl., ¶¶ 53-58. That is the
 16 same basic approach used by Brookdale. [REDACTED]

17 [REDACTED]. Umpierre Decl. Ex. D at
 18 BKD2874675-BKD2874760_Confidential.

19 Brookdale's claim that Dr. Flores' opinions should be excluded because her methodology is
 20 neither "scientific" nor "based on good grounds" is without merit. "In *Daubert*, the Court specified that
 21 it is the Rule's word 'knowledge,' not the words (like 'scientific') that modify that word, that
 22 'establishes a standard of evidentiary reliability.'" *Kumho Tire Co.*, 526 U.S. at 147 (citation omitted).
 23 Dr. Flores' opinions are reliable because she has the requisite specialized knowledge, skill, and
 24 experience in the assisted living industry to aid the trier of fact. *See, e.g., Messick*, 747 F.3d at 1198-99
 25 (reversing exclusion of expert opinion for failing to explain the scientific basis for conclusion where
 26 expert repeatedly referred to his own extensive clinical experience and his examination of medical
 27 records and literature; "A doctor using a differential diagnosis grounded in significant clinical
 28 experience and examination of medical records and literature can certainly aid the trier of fact and

1 cannot be considered to be offering ‘junk science.’”).

2 Brookdale claims that Dr. Flores’ methodology is unreliable because it “does not satisfy even
3 one of the *Daubert* factors.” Mot. at 19. But the *Daubert* factors do not constitute a definitive checklist
4 or test. Rather, a trial court should consider the specific *Daubert* factors where they are reasonable
5 measures of reliability. *Kumho Tire Co.*, 526 U.S. at 152; *see also Primiano*, 598 F.3d at 564 (factors
6 “meant to be helpful, not definitive, and the trial court has discretion to decide how to test an expert’s
7 reliability as well as whether the testimony is reliable, based on the particular circumstances of the
8 particular case”). As such, an expert’s personal knowledge or experience may be sufficient indicia of
9 reliability. *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006). Indeed, “the
10 *Daubert* factors ... simply are not applicable to [non-scientific] testimony, whose reliability depends
11 heavily on the *knowledge and experience* of the expert, rather than the methodology behind it.”
12 *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (internal
13 quotation marks and citations omitted).

14 **B. Dr. Flores’ Opinions Will Assist in the Class Certification Determination**

15 Brookdale claims that because the simple math analysis is “blunt” and “leaves out so many
16 things” it is “deeply flawed” and “unhelpful.” Mot. at pp.15-17. Yet, the Judge Staton found Dr.
17 Flores’ application of the simple math analysis in the matter of *Heredia v. Sunrise Senior Living, LLC*
18 to be helpful when she granted plaintiffs’ class certification motion in that case. *Heredia*, 2021 WL
19 6104188, at *5. Indeed, the simple math methodology is a generally accepted approach used by the
20 assisted living industry and industrial engineers to quantitatively measure the amount of staff required
21 to deliver needed care. Flores Decl., ¶ 19. That is because, for assisted living facilities and other
22 businesses that require staff, “[t]hey have to have some kind of simple way to know how much labor
23 they need if they’re providing a service.” Umpierre Decl. Ex. A (Flores Depo. at 34:8-11; *see also id.*
24 at 35:2-7; *see also id.*, Exs. D-KK (literature regarding available/required time to determine staffing).

25 Thus, the simple math analysis “provides a quick way to initially measure if staffing levels are
26 minimally sufficient to meet the assessed care needs of residents.” Flores Decl., ¶ 21. It is
27 “conservative” in its findings because it does not account for many time-consuming staff activities that
28

1 lessen the available time for Brookdale staff to provide care services to residents.¹¹ This “quick look”
 2 or “first step” tests and quantifies the amount of staffing shortfall, if any, occurring in each of the six
 3 “sample” facilities and is relevant to the class certification inquiry.¹² *See Daubert*, 509 U.S. at 596; *see*
 4 *also City of Pomona*, 750 F.3d at 1044 (noting that “[t]he district court is not tasked with dividing
 5 whether the expert is right or wrong, just whether his testimony has substance such that it would be
 6 helpful to a jury”) (internal quotations omitted).

7 Brookdale’s related argument that Dr. Flores failed to show that Brookdale facilities actually
 8 were understaffed also is meritless. Dr. Flores has opined that the flaws in Brookdale’s staffing policy
 9 place residents at “substantial and ongoing” risk of not receiving required care services. Flores Decl., ¶
 10 59; Umpierre Decl., Ex. A (Flores Depo. at 61:2-3; 61:16-19 (“A very high potential risk, because,
 11 based on the numbers, it seems almost impossible for the residents to have received the care that was
 12 required by them.”)); *id.* at 65:4-8 (“[M]y years of experience ... and my education and my knowledge
 13 tells me that if I don’t have enough staff hours available to meet the needs of the residents, something
 14 is going to be missed.”). As that is the risk consumers pay thousands of dollars to avoid when they
 15 contract with Brookdale for assisted living services, legal injury is established at the “time of
 16 purchase” under Plaintiffs’ case theory. *Nguyen v. Nissan N. Am. Inc.*, 932 F.3d 811, 819 (9th Cir.
 17 2019).

18 Moreover, Plaintiffs are not required to prove their claims on the merits at class certification; an
 19 expert “need not testify with certainty that the risk factors manifested.” *In re Toyota Motor Corp.*
 20 *Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, 978 F.Supp.2d 1053, 1069-70
 21 (C.D. Cal. 2013); *see also Primiano*, 598 F.3d at 565. Rather, at the class certification stage, an expert
 22 need only describe a workable method of analysis that will be used at trial. *See Zakaria v. Gerber*
 23 *Prods. Co.*, No. LA CV15-00200 JAK (Ex), 2016 WL 6662723, at *12 (C.D. Cal. Mar. 23, 2016).

25 ¹¹ The simple math analysis understates the staffing shortfall, if any, because it does not account for
 26 staff time spent on travel to and from residents, documenting resident charts, attending stand up
 meetings, and other administrative tasks. *See Flores Decl.*, ¶ 65.

27 ¹² Umpierre Decl. Ex. A (Flores Depo. at 47:2-6 (“[I]t is a blunt analysis that allows us to have some
 28 degree of results to let us know whether or not to move any further and have [Mr. Schroyer] do a more
 robust, more specific analysis.”)).

Nor was Dr. Flores required to offer any testimony about whether it was “substantially certain” that Brookdale’s staffing policies and practices would result in the denial of services to residents. Under applicable law, the “substantially certain” or “substantial certainty” standard applies to claims for breach of implied warranty under California law, not to claims under the CLRA or the UCL. *See, e.g., Yamada v. Nobel Biocare Holding AG*, 825 F.3d 535, 541 (9th Cir. 2016) (“In *American Honda*, the California Court of Appeal stated that for a California breach of warranty claim to proceed, the movant for class certification must provide ‘substantial evidence of a defect that is substantially certain to result in malfunction during the useful life of the product.’ 199 Cal.App.4th at 1375, 132 Cal.Rptr.3d 91. To do that, the movant must demonstrate through expert testimony that ‘there was an inherent defect and that it caused the product to malfunction or that it was substantially certain the product would malfunction as a result of the defect.’ *Id.* at 1377, 132 Cal.Rptr.3d 91.”); *Miller v. Fuhu Inc.*, No. 2:14-cv-06119-CAS-AS, 2015 WL 7776794, at *14-15 (C.D. Cal. Dec. 1, 2015) (discussing the “substantially certain” to manifest standard and its application to breach of warranty claims under California law).

C. Brookdale’s Benchmark-Hours Staffing Procedure is Defective

1. Dr. Flores’ Opinions on Brookdale’s Task Times

Brookdale argues that Dr. Flores misinterpreted the Acuity Norms spreadsheet by deriving specific task times to allocate for discrete care activities that Brookdale does not actually use to calculate labor benchmarks. Mot. at 7. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]” *Id.* at 7:9-12. But that is precisely how Dr. Flores interpreted the spreadsheet. Umpierre Decl. Ex. A (Flores Depo. at 123:4-5 (“We’re going by the average time per day.”); *id.*, 124:17-25 (“No. I interpreted C to mean in one day they’re getting 3 minutes, 8 times 8, 24 minutes. Q: So you actually took into account the amount of time that Brookdale allocates over a 24-hour period? A: We are talking about per day ... 24 hours a day, yes.”); *id.*, 142:20-22 (same); *id.*, 143:8-15 (same)).

Accordingly, Dr. Flores interpreted the Acuity Norms spreadsheet objectively and according to

its plain meaning, consistent with her background and experience. Declaration of Cristina Flores in Support of Plaintiffs' Opposition to Motion to Exclude ("Flores Opp. Decl."), ¶ 10; Umpierre Decl., Ex. A (Flores Depo. at 122:10-15 ("Yes. 3 minutes eight times a day is what this particular spreadsheet shows.")); *id.*, 120:12-121:8¹³; 124:4-9; 185:3-12 (Flores and Bowman with same interpretation).¹⁴ Dr. Flores' deposition testimony is clear that her interpretation was not – as Brookdale suggests – to find "individualized episodes of care" but rather "the complete day's needs of service ... We're going by average time per day." *Id.*, 122:25-123:5. However, because line-item care services are delivered at various frequencies throughout the day, the aggregate daily time allotted to perform a particular care task must be considered episodically in relation to the frequency with which it is delivered when making a reasonableness determination. *Id.*, 191:4-7 ("The way the simple math analysis works is to take the time required by the frequency to come up with the number. We're looking at it per day. We're not breaking it down."); *id.*, 143:12-15 ("I believe the overall time in the day is too small, because ... the 3-minute factor is part of that [aggregate] number, so it's too low."). After extensive discovery (that remains ongoing), Plaintiffs are not aware of any Brookdale policy document interpreting Brookdale's task times any differently.

Dr. Flores specifically examined the task time data provided by Brookdale to ensure that such task time data was consistent with peer-reviewed scientific literature, her 30 years of experience as a registered nurse providing care to assisted living residents,¹⁵ and other task time data for other assisted living facilities (ALF). Flores Decl., ¶¶ 51-52. For example, where Dr. Flores deemed that a Brookdale

¹³ "I had already reviewed the policies and procedures and practices of Brookdale. And I can interpret this ... 'Okay. What does this mean?' And I would look to it and see if I understood it, and ... if I didn't know what something meant on it, I would have to refer back to the assessment information or to Brookdale's information, the policy [sic] of procedure. But this is fairly simple. They characterized care. They've assigned acuity levels. And it looks like ... breakfast, lunch, supper, evening, night. And this is how they break things down in Brookdale."

¹⁴ "Well, I interpreted the spreadsheet to mean that these numbers are what they use for their task times for specific categories of care."

¹⁵ Expert witness reliability can be shown from "personal knowledge or experience," if the expert possesses "the minimal foundation of knowledge, skill, and experience" to support the opinion. *Zagruzny*, 2020 WL 3968672, at *1; *see also Elosu*, 2022 WL 534345, at *6 ("An expert's specialized knowledge and experience can serve as the requisite 'facts or data' upon which they render an opinion."); *Ralston*, 2011 WL 6002640, at *4 ("Court's frequently accept experience-based expert opinion testimony on relevant aspects of industry practice that do not offer themselves readily to scientific or statistical analysis.").

1 task time was contrary to her experience as a registered nurse, scientific peer-reviewed literature, and
 2 ALF industry task time data, she replaced the unreasonable task time supported by one or more of the
 3 above sources. *See* Flores Decl., ¶ 51. With respect to her review of the Brookdale task time data
 4 however, out of the 95 repetitive services required by Brookdale residents, Dr. Flores used Brookdale's
 5 times for services in 74% of instances. Flores Opp. Decl., ¶ 7.

6 Of the 95 possible care services used by Dr. Flores (and Mr. Schroyer) to calculate required
 7 hours, the task times and frequencies for 70 of these services derived directly from Brookdale's own
 8 Acuity Minutes Norms and Clinical Time Studies.¹⁶ *Id.* Brookdale contends that Plaintiffs' experts
 9 manipulated task frequencies and task times by intentionally misinterpreting the Acuity Minutes
 10 Norms spreadsheet (BKD2874663) to define a per day task frequency or average task time for
 11 bathroom assistance and mobility. *See, e.g.,* Mot. at 5-9. A portion of this spreadsheet is set forth
 12 below:

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 Flores Opp. Decl., ¶ 8. This Brookdale spreadsheet contains [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]. Flores Opp. Decl., ¶ 9. Notably, [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]

28 ¹⁶ The remainder of the care service task times and frequencies derived from peer-reviewed scientific literature, the ALF industry, or upon the nursing experience of Dr. Flores. Flores Decl., ¶ 52.

1 [REDACTED]

2 Plaintiffs' expert's interpretation of the Acuity Minutes Norm spreadsheet is consistent with the

3 document's language and structure. Flores Opp. Decl., ¶ 10. Further, their interpretation of the

4 frequencies (in this Acuity Minutes Norms spreadsheet) is confirmed by a second Brookdale internal

5 document known as the Clinical Time Studies spreadsheets (BKD2886744-5), which are attached as

6 Exhibit E to the Umpierre Declaration. This document includes the following relevant information:

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 Flores Opp. Decl., ¶ 11.

13 Brookdale argues that a [REDACTED]

14 [REDACTED] is unreasonable and constitutes a deliberate attempt to manipulate the minutes of

15 required staff time. Brookdale's attack ignores the fact that [REDACTED]

16 [REDACTED] is well supported by scientific, peer-reviewed journal articles.¹⁷ This literature

17 was disclosed to Defendants prior to Dr. Flores' deposition testimony, and is part of her declaration.

18 Flores Opp. Decl., ¶¶ 12-13.

19 Moreover, Brookdale's contentions about the average task times used by Plaintiffs' experts

20 ignores scientific, peer-reviewed journal articles regarding the amount of time required to deliver basic

21 care services such as toileting assistance as well as ALF industry task times. Both the scientific

22 literature and industry task times show that actual bathroom assistance (not mere reminders) invariably

23 requires [REDACTED].¹⁸ Furthermore, [REDACTED]

24 ¹⁷ See Umpierre Decl., Ex. D (Ouslander, J., Schnelle J.F., Simmons S.F., Bates-Jensen B., Zeitlin M. (1993). *The Dark Side of Incontinence: Nighttime Incontinence in Nursing Home Residents*. J Am Geriatr Soc, 41: 371-376); *id.*, Ex. E (Engberg, *Effectiveness of Prompted Voiding*, J WOCN, September 2002, 252-265); *id.*, Ex. F (Newman D.K., *Evidence Based Practice Guideline—Prompted Voiding for Individuals with Urinary Incontinence*, Journal of Gerontological Nursing, Vo. 45, No. 2 (2019), 14-26).

27 ¹⁸ Basic toileting assistance has been reported in the literature as requiring 5.5 to 7.9 minutes [REDACTED]

28 [REDACTED]. Umpierre Decl., Ex. G (Schnelle J.F., *A Behavioral Analysis of Labor Cost of*

1 [REDACTED] is facially unreasonable for the level of care defined by the question, [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] Umpierre Decl., Ex. LL at BKD1165227. Dr. Flores states that, *for just one*
 5 *episode of that level of care*, the time required could easily exceed the total daily time of [REDACTED]
 6 [REDACTED] in the Acuity Minutes Norms spreadsheet. Flores Opp. Decl., ¶¶ 14-16
 7 (emphasis added). This inadequate daily time allotment of [REDACTED]
 8 [REDACTED] is further contradicted by Brookdale’s Clinical Time Studies
 9 spreadsheets [REDACTED]
 10 [REDACTED]. Brookdale’s input arguments regarding the task times and
 11 frequencies for mobility/escorting assistance are similarly flawed. *Id.*, ¶17.

12 Regardless, Dr. Flores’ expert opinion – based on her education, experience, and industry
 13 literature – is that the aggregate times over the course of a day that Brookdale allocated for bathroom
 14 (toileting) assistance and escorting/mobility were too low and unreasonable.¹⁹ Umpierre Decl. Ex. A
 15 (Flores Depo. at 143:20-144:6, 157:22-158:13, 161:2-11); Flores Decl., ¶¶ 50-52. Dr. Flores’ extensive
 16 experience with the provision of assisted living services, alone, is a sufficient basis to sustain a finding
 17 that her opinion in this regard is reliable. *Ralston*, 2011 WL 6002640, at ** 4-5; *United States v.*
 18 *Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006) (“When evaluating specialized or technical
 19 expert opinion testimony, the relevant reliability concerns may focus upon personal knowledge or
 20 experience.”). As the aggregate daily times were too low, so also were the corresponding benchmarks
 21 too low, leading directly to the inability of Brookdale’s staffing formula to provide a sufficient amount
 22 of care staff time to meet the assessed needs of its residents. That Brookdale disagrees with Dr. Flores’

23 _____
 24 *Managing Continence and Incontinence in Nursing Home Patients*, Journal of Organizational Behavior
 25 Management, Vol. 9(2) (1988), 137-153)). Further, the Watermark ALF chain allots up to 20 minutes
 26 per episode, and the Aegis ALF chain allots up to 30 minutes. These industry task times are a function
 27 of how bathroom assistance is defined – *i.e.*, the specific services included within bathroom assistance.

28 ¹⁹ Brookdale claims that Dr. Flores cannot offer a “new” opinion “about the sufficiency of the Total
 Task Time allocated for Bathroom Assistance and Mobility over the course of a 24-hour period.” Mot.
 at 10:7-8. But Dr. Flores’ opinion in this regard is not “new.” Umpierre Decl. Ex. A (Flores Depo. at
 143:8-15 (“... I believe the overall time in the day is too small, because [] the 3-minute factor is part of
 that number, so it’s too low.”)).

1 data inputs and the conclusions she reached based on an analysis of Brookdale’s data is not a basis to
 2 exclude her opinion or testimony in this case. *City of Pomona*, 750 F.3d at 1045 (“Dr. Sturchio's expert
 3 report details how he analyzed the relevant data and applied the data to reach his conclusions. The
 4 Federal Rules of Evidence do not require an endorsement from the EPA approving Dr. Sturchio's
 5 results. The district court's conclusion to the contrary was an abuse of discretion.”).

6 *Ralston* is instructive. There, plaintiff moved to exclude a defense expert’s testimony and
 7 rebuttal report opposing class certification on the grounds that the expert’s opinions were simply “rank
 8 speculation” because they were not based on a reliable foundation including but not limited to
 9 empirical evidence. *Id.*, 2011 WL 6002640, at *3. The court declined to exclude the expert’s opinions
 10 insofar as they related to the expert’s knowledge and experience concerning standard industry
 11 practices. *Id.* at **4-5. Formal research and empirical evidence supporting an expert’s opinions are not
 12 required for admissibility. *Id.* (noting that “[c]ourts frequently accept experience-based, expert opinion
 13 testimony on relevant aspects of industry practice that do not offer themselves readily to scientific or
 14 statistical analysis”).

15 Here, Dr. Flores has extensive personal and professional experience in the assisted living
 16 industry, not only as an individual in practice but also as a Certified RCFE Administrator and educator
 17 who has been provided numerous research grants to study assisted living facilities in California. Flores
 18 Decl., ¶¶ 7-16. Far from being based on “subjective and unsupported assumptions,” Dr. Flores
 19 describes in her declaration and her deposition testimony how that vast quantity of experience supports
 20 each of the opinions she has formulated in this case, including why Brookdale’s aggregate task times
 21 for bathroom (toileting) assistance and escorting/mobility are too low and not reasonable. *See id.*, ¶¶
 22 50-52. *See Ralston*, 2011 WL 6002640, at *4 (“By relying solely or primarily on experience, however,
 23 [the expert] must establish how his experience provides a basis for and leads to the conclusions that he
 24 reaches.”); *Cf In re PFA Insurance Marketing Litig.*, 2021 WL 5994908, at *5 (excluding expert’s
 25 fourth opinion as speculative and unsupported where plaintiffs “have pointed to no portion of [the
 26 expert’s] report or deposition testimony” where he explains how his industry experience supports his
 27 opinion).

28 Thus, Brookdale’s reliance on *In re REMEC Inc. Sec. Litig.*, 702 F.Supp.2d 1202, 1219-20

(S.D. Cal. 2010), is unavailing. Like the expert in *Ralston* and Dr. Flores in this case, the opinions of the plaintiffs' expert in *In re REMEC* were "sufficiently reliable to be admissible evidence because his declaration elucidates the basis of his conclusions" which were sufficiently tied to plaintiffs' claims. *Id.* at 1218 (describing how expert chose assumptions used, including actual data from industry participant and industry expectations). The court rejected defendants' challenges to the expert's analysis and inputs – including his professional judgment,²⁰ his interpretation of the governing accounting standard,²¹ and the accuracy of certain factual assertions and calculations²² – correctly holding that such perceived deficiencies could be explored through cross examination. *Id.* at 1219. The single opinion the court did exclude as being based on the expert's subjective belief or unsupported speculation concerned the conclusion that defendants should have conducted interim impairment tests. *Id.* It did so because the expert reached this conclusion without analyzing whether a triggering event required defendants to conduct interim impairment tests. *Id.* ("When asked about his analysis at his deposition, [the expert] admitted that he had not performed an impairment test to demonstrate that the identified events would have reduced the fair value of the Commercial wireless segment below its carrying value."). Dr. Flores' analysis suffers from no such infirmity.

Brookdale's other authorities are similarly unavailing. The court in the out-of-circuit *Tyger Const. Co. Inc. v. Pensacola Const. Co.*, 29 F.3d 137 (4th Cir. 1994), held that an expert's opinion was inadmissible because *undisputed* evidence, including the expert's own admission, explicitly negated the expert's damages theory. *Id.* at 142-143. "*Tyger* is a textbook example of the exception case in which an expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury [and] must ... be excluded." *Patriot Rail Corp. v. Sierra R. Co.*, No. 2:09-cv-0009-TLN-AC, 2015 WL 4662707, at *13 (E.D. Cal. Aug. 5, 2015) (internal quotations and citation omitted). Here, Dr. Flores' opinions are based on sufficient, and sometimes *disputed*, facts and reasonable assumptions borne of

²⁰ For example, the expert's assertion that "Powerwave is the better indicator of expected REMEC commercial performance." *In re REMEC*, 702 F.Supp.2d at 1218-19.

²¹ For example, the expert's assertion that "REMEC improperly excluded the best comparison company." *In re REMEC*, 702 F.Supp.2d at 1219.

²² For example, the expert's assertions that "forecast results were directed by management ... budgets must be regarded as inherently unreliable ... REMEC's goodwill impairment test was based on unrealistic and unachievable targets." *In re REMEC*, 702 F.Supp.2d at 1219.

her extensive experience in the assisted living industry. Brookdale's quibble with Dr. Flores' interpretation of the available evidence is not a basis to exclude her opinions. *Primiano*, 598 F.3d at 564.

Rodman v. Otsuka America Pharmaceutical, Inc., No. 18-cv-03732-WHO, 2020 WL 2525032 (N.D. Cal. May 18, 2020) is distinguishable. There, an expert's opinion that an antipsychotic drug's label failed to adequately describe the incidence rate of tardive dyskinesia ["TD"] was based on a survey of published scientific literature. *Id.* at *4. However, published studies comprising two of the expert's sources cautioned that they could not be used to calculate an incidence rate for TD and the expert conceded at deposition that those studies did not provide her with an incidence rate of TD. *Id.* at *5. Here, the Acuity Norms spreadsheet upon which Dr. Flores partially relied in this case is "a generic spreadsheet containing Brookdale's baseline norms for various ADL care activities." Mot. at 5-6. It is not a published study in the scientific literature. *See id.* at 7-8. Nor is Dr. Flores required to accept Brookdale's interpretation of disputed facts. *In re NJOY*, 120 F.Supp.3d at 1070-71 (expert may testify on "his party's version of the disputed facts").

2. Dr. Flores' Opinions in Other Litigation

Brookdale's argument that Dr. Flores' opinions in this case should be excluded because they are directly contradicted by her prior findings and opinions regarding task times and staffing in other litigation is a red-herring. As Dr. Flores explained, this is an apples to oranges comparison because Brookdale defines care tasks and categories differently from other assisted living chains. Umpierre Decl. Ex. A (Flores Depo. at 148:17-149:10 (Flores testimony that Brookdale defines the highest acuity bathroom task to include laundry and showering which other ALF chains do not); *id.*, 155:12-21 (same); *id.*, 210:12-16 (re Aegis); *id.*, 293:2-294:24). Stated differently, one cannot view any particular task time in a vacuum without also considering how that task is defined; and how that task is defined will bear directly on how long it takes and the frequency with which it is delivered. For example, Dr. Flores explained why it was not appropriate to compare Aegis task times to Brookdale task times: "Here's why: Aegis breaks down [] every little step of everything. That's why, in the Aegis case, there are more than – I believe more than three times the number of service items in my service code key for Aegis. They break things down completely differently than Brookdale. So we have to start over. You

1 can't go back and say, 'Okay, here's the Aegis times. Let's just apply this service code key to
 2 Brookdale.' It's a – you can't do it. It's impossible." Umpierre Decl., Ex. A (Flores Depo. at 199:8-
 3 20). *See also id.* at 294:4-5 ("They might have included the escort with their toileting."). That Dr.
 4 Flores tailored her analysis to the specific facts of this case, by using Brookdale's own data where
 5 appropriate, is an indicia of the relevance and reliability of same. *See Kumho Tire Co.*, 526 U.S. at
 6 156-57; *City of Pomona*, 750 F.3d at 1044.

7 As such, Brookdale's claim that Dr. Flores based her opinion concerning the insufficiency of
 8 Brookdale's Total Task Times for Bathroom Assistance on cherry-picked evidence to the exclusion of
 9 evidence contradicting her conclusions is baseless. Mot. at 11. Unlike the plaintiffs' cardiology expert
 10 in *In re Bextra*, Dr. Flores' experience and training in the assisted living industry qualify her to opine
 11 that certain task times are more reasonable than others, when taking into account how specific tasks are
 12 defined. *Cf. In re Bextra and Celebrex Marketing Sales Practices and Products Liability Litig.*, 524
 13 F.Supp.2d 1166, 1176 (N.D. Cal. 2007). What is more, Brookdale's characterization of Dr. Flores'
 14 opinions in this case as litigation driven misses the mark. Dr. Flores' decades-worth of experience in
 15 the assisted living industry vastly predates the offering of her opinions in this litigation. Flores Decl.,
 16 ¶¶ 7-16. In other words, Dr. Flores' opinions and testimony "... grow[] naturally and directly out of
 17 research [she has] conducted independent of the litigation ..." *In re Bextra* at 1176 (quoting *Daubert v.*
 18 *Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)). And insofar as *In re Bextra*
 19 concerned the suitability of expert opinions on complex issues of causation and the use of
 20 epidemiological studies to prove Celebrex is capable of causing heart attacks or strokes at certain
 21 doses, it is inapposite. *Id.* at 1173. *Cf.* Flores Decl., ¶ 21 (simple math analysis "provides a quick way
 22 to initially measure if staffing levels are minimally sufficient care needs of residents ... [it] (a)
 23 provides an extremely conservative measurement of required staffing hours; and (b) can be applied to
 24 initially test and quantify the amount of staffing shortfall, if any, occurring" in Brookdale's facilities).

25 3. Dr. Flores Did Not Retract Any Opinions Offered in Her Declaration

26 Dr. Flores did not retract any of her opinions at deposition and Brookdale's argument otherwise
 27 is a mischaracterization of her testimony. Mot. at 12-13. Dr. Flores' point – then and now – is that,
 28 when accounting for the frequency with which the toileting/bathroom assistance and mobility/escort

1 tasks are delivered on a daily basis, Brookdale’s aggregate times for these tasks are *too low*, no matter
 2 which source one considers. Umpierre Decl. Ex. A (Flores Depo. at 190:11-25; 191:12-17). Thus,
 3 whether Brookdale’s own task times contradict each other is of no moment; they are too low, as
 4 evidenced by [REDACTED]
 5 [REDACTED]. *Id.*, 289:22-290:7.

6 **4. DSS Staffing Citations Support Dr. Flores’ Opinion That Brookdale’s** 7 **Staffing Methodology is Defective**

8 Dr. Flores’ opinions that Brookdale’s benchmark-hours staffing methodology is defective and
 9 results in understaffing that subjects Brookdale residents to a substantial and ongoing risk of not
 10 receiving required and promised services are supported by the substantial number of deficiencies
 11 issued to Brookdale by DSS during that class period. The vast majority of more than 800 deficiencies
 12 issued to 71 Brookdale facilities in California from 2015 to 2021 were related to staffing issues either
 13 directly (for specifically failing to have sufficient numbers of staff)²³ or indirectly being indicative of
 14 insufficient numbers of staff, poor resident care, and other problems that are consistent with facility
 15 understaffing.²⁴ See Flores Decl., ¶¶ 79-81. The DSS citations, therefore, are but another data point –
 16 like the DES testing²⁵ performed by Dr. Schroyer among others – that support and validate Dr. Flores’
 17 opinions.

18 **V. CONCLUSION**

19 Based on her education, training, and experience, Dr. Cristina Flores has concluded after an
 20 analysis of Brookdale’s documents, data, and policies that its benchmark staffing methodology is
 21 defective, such that residents face a “substantial and ongoing” risk of not receiving required care
 22 services as a result. Her “simple math” approach is a commonly accepted means of ensuring that a
 23 facility is staffed to meet the assessed needs of its residents, and her methodology essentially mirrors

24 ²³ See Flores Decl., ¶ 82(a-i).

25 ²⁴ See Flores Decl., ¶ 83.

26 ²⁵ Indeed, the extensive DES testing performed in this case provides robust confirmation of Dr. Flores’
 27 analysis of the systemic flaws in Brookdale’s corporate staffing procedures. Specifically, the over 1.3
 28 million DES engineering tests and failure analyses conducted on the six Brookdale facilities for which
 Plaintiffs have substantially complete assessment and payroll data indicate over the 3-year study period
 a daily average staffing shortfall of 41.5% per facility. Schroyer Decl., ¶ 77.

1 the approach reflected in Brookdale's staffing procedures. Brookdale's various attacks – that Dr.
2 Flores relied on unsupported assumptions, misinterpreted Brookdale's data, ignored facts, and cherry-
3 picked data that would support her conclusions – are not only factually erroneous, but also do not
4 support the exclusion of her expert opinions. Brookdale's real disagreement lies with Dr. Flores' inputs
5 and conclusions, which are matters appropriate for cross examination. Accordingly, Brookdale's
6 motion should be denied.

7 DATED: March 18, 2022

Respectfully submitted,

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By: /s/ Brian S. Umpierre

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